To: Members of the Rules and Open Government Committee
From: Bert Robinson, Sunshine Reform Task Force
Re: The Balancing Test

Summary: The California Public Records Act includes a "balancing test" which allows governments to withhold any otherwise public record by arguing that the public interest is best served by non-disclosure. "Sunshine Law" reformers often cite the balancing test as the biggest flaw in the act, because it is so broad, and so open to abuse. The two primary Sunshine Laws that the Sunshine Reform Task Force used as models, San Francisco and Milpitas, expressly eliminated the balancing test and the related "deliberative process privilege" – apparently to no ill effect. The Task Force recommends that San Jose follow suit.

San Jose city officials suggested to us, as they will suggest to you, that the balancing test is used to protect many legitimate interests. In response, Task Force members talked to officials in San Jose about their experiences, and to their counterparts in San Francisco and Milpitas about life without the balancing test. We then crafted a series of specific exemptions to address the concerns we uncovered – concerns such as safety, security and personal privacy – making it easy to protect these important interests. Thus, our recommended approach is more conservative than the Milpitas or San Francisco laws.

In one area, however, we sharply disagree with city staff. The staff argues that the balancing test is necessary to protect the inner workings of San Jose city government – the "deliberative processes" that leads to policy formulation. It is our view that the public has a strong interest in those processes, and that secrecy can lead to mischief. Consider one example. Recently, the federal Environmental Protection Agency rejected California's request that it be allowed to regulate greenhouse gas emissions from automobiles. The Agency's head said California's approach would actually harm the environment. Later, documents were leaked that revealed quite the opposite: In internal deliberations, agency scientists backed California's proposals as a good approach. Ultimately, the public interest in understanding these deliberative processes was high.

Background: The California Legislature added the clause that has become known as the balancing test to the CPRA. It is also known as Government Code section 6255 (a), and it reads as follows. The portion that institutes the balancing test is in italics:

> (a) The agency shall justify withholding any record by demonstrating that the record in question is exempt under express provisions of this chapter or that *on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record.*

The clause is in essence a catch-all, included because of a belief that the specific exemptions in the act would not encompass every record that ought not be disclosed. Over time, this clause has been used to protect records that, for instance, might compromise the safety and security of local residents – and those uses have, in general, not been controversial. Controversy has ensued from other uses, especially withholding

deemed necessary to protect the "deliberative processes'' of government officials. The "deliberative process privilege,'' as it has become known, stems primarily from a 1991 Supreme Court decision regarding a media request for the appointment calendars of Gov. George Deukmejian. The court rejected the request, saying it was loathe to "expose the decision-making process in such a way as to discourage candid discussion."

The contemplation of the balancing test is that public officials will carefully weigh the benefits of disclosure against the benefits of withholding on a case-by-case basis. It should be rare in practice that the public interest is best served by non-disclosure.

The problem: As suggested above, the fear about 6255 is that it can be invoked at any time, on any record, leading to suspicion that political interests in non-disclosure may at times overwhelm the public interest. Because only the agency has possession of an undisclosed record, it is not possible for the public to second-guess the agency's invocation of the balancing test, short of going to court. The balancing test also adds an air of unpredictability to public disclosure, since the judgment call involved may be seen differently by different individuals. One city attorney may come down on the side of non-disclosure where another would not.

The approaches: In order to form its recommendation, task force members asked City Attorney Rick Doyle to describe the city's use of the balancing test. The members also asked officials in other cities with sunshine laws for input, posing the following question: "What interests in non-disclosure that the city would like to protect are difficult to protect without a balancing test?'' From these inquiries, the subcommittee devised a list of specific exemptions to add to San Jose's Sunshine Law.

To summarize, our approach is adopt the Milpitas-SF language that commits the city not to use the balancing test or the deliberative process privilege to withhold records. But we would couple that language with four specific exemptions that encompass legitimate interests. The legal language is part of your packet, but broadly they are:

a.) **Personal information provided by private citizens.** This exemption encompasses situations where private individuals, through an interaction with the city, have provided personal information to the city with no expectation that the information would become public.
b.) **Identities of public employees who provide information in internal investigations.** This is an issue that arose during the recent release of the investigation into Auditor Jerry Silva, where the names of employees who complained were redacted to protect the confidentiality of their interactions with the investigator.
c.) **Security/safety.** This exemption allows the city to keep private information that might compromise public safety or security if released.
d.) **Memos addressing closed meeting issues.** This exemption makes explicit what is implied in the Brown Act – that material dealing with a closed session issue (a memo outlining the Mayor's goals for union negotiations, for example) can be withheld.